IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 583 of 1992

with

CRIMINAL REVISION APPLICATION No 172 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

MANIBHAI DESAIBHAI VAGHELA

Appearance:

1. Criminal Appeal No. 583 of 1992

Ms Kathaben Gajjar, APP, for the Appellant

MR K.B. ANANDJIWALA, for Respondent No. 1

2. Criminal Revision ApplicationNo 172 of 1992

MR AJ PATEL for Petitioner

Ms Kathaben Gajjar, APP, for Respondent No. 1

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 05/05/2000

CAV JUDGEMENT

#. These two criminal matters are filed to challenge the judgement exh.118 dated 26.12.1991, rendered by the Judicial Magistrate First Class (Shri B.A.Gadhvi), Anand (who will be referred to herein after as the "learned Magistrate" for the purpose of brevity and convenience) in Criminal Case No.3159 of 1982 which was there on his file whereby he acquitted the accused u/s 248(1) of Criminal Procedure Code, 1973 (Cr.PC for short) for an offence punishable under Section 408 of the Indian Penal Code 1860 (IPC for short).

#. The State Government has preferred Criminal Appeal No.583 of 1992 against the aforesaid order of acquittal passed by the learned Magistrate while original complainant has filed Criminal Revision Application No.172 of 1992 under Section 401 read with Section 397 of Cr.PC challenging the correctness, legality and propriety of the aforesaid acquittal order dated 26.12.1991 passed by the learned Magistrate, by rendering his judgment in Criminal Case No.3159 of 1982.

#. As these two matters have arisen from out of one common judgement of acquittal rendered by the learned JMFC in Criminal Case No.3159 of 1982 on his file, these two matters are disposed of by this common judgement.

#. The facts leading to the present two criminal matters are in nutshell as follows:-

#. The respondent in Criminal Appeal No.583 of 1992 and Revision-Opponent in Criminal Revision Application No.172 of 1992 is the same person named, Manibhai Desaibhai Vaghela who was accused in Original Criminal Case No.3159 of 1982. The Revision-Petitioner in Criminal Revision Application No.172 of 1992 is Shri Rohitkumar J Patel who was original complainant of Criminal Case No.3159 of 1982. For the sake of convenience, respective parties will be referred to as the complainant and accused hereinafter. As per complaint at exh.90 dated 16.02.1982 the case of the complainant Shri Rohitkumar Jasbhai Patel against the sole accused Manibhai Desaibhai Vaghela, can be summaried as follows:-

#. The complainant is a businessman running following three different sister concerns at Anand, namely, (i)

Puja Sales Corporation, (ii) Swastik Sales Corporation, and (iii) Rajashree Trading Corporation.

#. The complainant is carrying on his business in 3 different names of firms as aforesaid at Jamesons House, Subhash Road, Anand. The complainant is managing the business affairs of the aforesaid 3 firms. The complainant is carrying on his business of household flourmill, refrigerator and domestic appliances in the name and style of aforesaid firms at serial no.1 and 2 while he is carrying on business of electric motors in the name and style of firm at serial no.3 as aforesaid.

#. It is the specific case of the complainant that the accused joined his services in Swastik Sales Corporation for the first time in the year 1970 and subsequently in the year 1973 he was entrusted with the work of cashier in the firm Swastik Sales Corporation. Thereafter, in the year 1974-75 the accused was entrusted with the work of cashier in the remaining two other firms. Thus, it is the case of the complainant, that accused was serving in the aforesaid 3 firms and was handling the work of cashier for the said 3 firms. Stating about the duties of the accused, the complainant has stated that accused as cashier was doing the work relating to receiving of cash and making of payment of cash relating to all business transactions of the aforesaid 3 firms, writing of cheques, calling for the cash by drawing cheques from the banks, depositing of the cash amounts in the banks etc. He was also preparing vouchers and account-statements for day-to-day business of the aforesaid 3 firms. The accused was also doing the work with regard to tallying of the accounts with the bank accounts.

(A) It is the case of the complainant that accused drew an amount of Rs.26,000/- by following four items from Swastick Sales Corporation by preparing false debit/credit vouchers for depositing that amounts in the banks.

Rs.3,000/- on 27.1.1979
Rs.5,000/- on 23.6.1979
Rs.5,000/- on 25.7.1979
Rs.13,000/- on 24.1.1980

Total Rs.26,000/-

(B) It is also the case of the complainant that the accused had taken with him following two cheques

signed by the complainant with an endorsement of "self" in the column of "pay to" and drew an amount of Rs.6,000/- by encashing those two cheques from Anand Mercantile Co-op. Bank Limited of Anand and accused failed to credit that amount in the books of accounts of Swastik Sales Corporation and thus accused has embezzled a total amount of Rs.6,000/-.

(1) Rs.2,000/- by cheque no.42152 dated 26.11.77
(2) Rs.4,000/- by cheque no.73506 dated 19.01.79
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Total. Rs.6,000/-

#. It is the case of the complainant that accused withdrew a cash amount of Rs.4,000/- by preparing the following false debit vouchers, from the cash of Pooja Sales Corporation and did not deposit said amount in the bank.

(1) Rs.2,000/- on 13.9.1979
(2) Rs.2,000/- on 11.10.1979
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Total: Rs.4,000/-

##. It is the case of the complainant that accused had withdrawn Rs.6,000/- from the cash of Rajashri Trading Company by preparing false debit vouchers by following two items and did not get those amounts credited in the Anand Mercantile Coop. Bank:-

(1) Rs.5,000/- on 10.10.1979
(2) Rs.1,000/- on 08.09.1979
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Total: Rs.6,000/-

It is also the case of the complainant that accused encashed cheque no.78723 dated 5.1.1980 drawn by Rajshri Trading Company, as drawee for Rs.3,000/- and did not credit that amount in the account books of Rajashri Trading Company. Thus, it is the case of the complainant that the accused has embezzled in all Rs.9,000/- of Rajashri Trading Company.

Thus, in short, it is the case of the complainang that the accused has committed an offence of criminal breach of trust for in all Rs.45,000/- from three different firms of the complainant as follows:-

(1) Rs.32,000/- from Swastik Sales Croporation
(2) Rs. 4,000/- from Puja Sales Corporation
(3) Rs. 9,000/- from Rajashri Trading Company
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Total:Rs.45,000/-

It is the case of the complainant that accused in his capacity as cashier of the aforesaid three different firms committed an offence of criminal breach of trust in respect of Rs.45,000/- as aforesaid and further that he has also committed an offence of cheating as defined u/s 415 of the IPC by dishonestly inducing the complainant to make delivery of the aforesaid total amount of Rs.45,000/- to him.

##. Giving aforesaid particulars in detail in his complaint, the complainant lodged his complaint exh.90 in the court of the learned Magistrate on 16.2.1982. That private complaint came to be registered as Inquiry No.31 of 1982. The learned Magistrate sent that complaint for police investigation u/s 156(3) of Cr.PC and that complaint came to be registered as C.R. No. M Case No.18 of 1982 on 20.3.1982 in Anand Town Police Station. On the basis of that complaint, the police started to make investigation against the accused and on completion of the investigation, P.I. of Anand Town Police Station charge sheeted the case against the accused in the Court of the learned Magistrate on 30.9.1982. The charge sheet came to be registered as Criminal Case No.3159 of 1982.

##. The learned Magistrate framed charge against the accused on 28.10.1989. That charge was framed for an offence punishable u/s 408 of IPC only by giving particularls to the effect that accused has committed criminal breach of trust as cashier for a total amount of Rs.45,000/- during the period from 26.11.1977 to 5.1.1980 from 3 different firms of the complainant. The prosecution examined in all 6 witnesses in support of the case of the prosecution. The prosecution also produced a bulky evidence of documents in support of its case. Thereafter, the further statement of the accused u/s 313 of Cr.PC was recorded on 17.1.1991, after prosecution closed their evidence vide purshis at exh.107. During the course of recording of the further statement of the accused, the accused submitted his written reply exh.109. Thereafter, after hearing the arguments of learned advocates for both the parties and after appreciating the evidence led by the prosecution, the learned Magistrate came to the conclusion that the prosecution has failed to prove the case against the accused for which a charge exh.4 has been framed and therefore by rendering his

judgement exh.118 on 26.12.1991 he passed an order of acquittal u/s 248(1) of Cr.PC and acquitted the accused for an offence punishable u/s 408 of IPC.

##. Being aggrieved against and dissatisfied with the said order of acquittal vide judgment exh.118 dated 26.12.1991, the State Government has preferred Criminal Appeal No.583 of 1992 and the original complainant has filed Criminal Revision Application No.172 of 1992.

##. Shri A.B. Munshi, the learned advocate for the Revision-Petitioner, has taken this Court through the oral as well as documentary evidence led by both the parties. He also read the judgement which is challenged in this Appeal/Criminal Revision Application. I have heard Ms Kathaben Gajjar, the learned APP for the State appellant of Criminal Appeal No.583 of 1992, Shri A.B. Munshi, the learned advocate for the Revision-Petitioner (original complainant) and Shri K.B. Anandjiwala, the learened advocate for the Respondent / Revision-Opponent (accused) in detail, at length. I have gone through the original record of the case which has been called for from the lower Court.

##. Before this COurt takes up rival submisions for consideration, it is necessary to know the scope and powers of this COurt when an appeal is preferred against the judgement of acquittal by the trial court. In case of S. GUIN V. GRINDLAYS BANK LTD. reported in AIR 1986 SC 289. It has been observed in para 3 of the said judgement as follows:-

> "After going through the judgment of the Magistrate and of the High Court we feel that whatever might have been the error committed by the Magistrate, in the circumstances of the case, it was not just and proper for the High Court to have remanded the case for fresh trial, when the order of acquittal had been passed nearly six years before the judgment of the High Court. The pendency of the Criminal Appeal for six years before the High Court is itself a regrettable feature of this case. In addition to it, the order directing retrial has resulted in serious prejudice to the appellants. We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 482, Criminal

Procedure Code even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process." ....

"4. We are of the view that following the above principle the High Court should have dismissed the appeal before it even if it disagreed with the view taken by the trial Court with regard to the gist of the offence punishable under Section 341 Indian Penal Code, having regard to the inordinate delay of nearly six years that had ensued after the judgment of acquittal, the nature and magnitude of the offences alleged to have been committed by the appellants and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly 7 years after the incident."

In the case of RAMESH BABULAL DOSHI V. THE STATE OF GUJARAT reported in 1996 (2) GLH p. 206 (Supreme Court) the Honourable Supreme Court has made it clear as to what is the scope of the acuqittal appeal before the High Court. It has been observed in para 7 as follows:-

"Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial Court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellant Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong,

manifestly erroneous or demonstrably unsustainable. If the appellant Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellant Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then - and then only reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial Court are sustainable or not."

##. The learned advocate Shri K.B. Anandjiwala for the respondent-accused has cited an authority of Hon'ble Supreme Court in the case of AJIT SAVANT MAJAGVAI V. STATE OF KARNATAKA reported in 1997 SCC (Cri) 992. In para 16 on page 998 the Honourable Supreme Court has enunciated the following principles for governing and regulating the hearing of appeal by the High Court against an order of acquittal passed by the Court :-

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under :-

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the findings of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reason for not accepting those grounds and not subscribing to the view

expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witnessbox.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

##. Keeping in mind the above legal position with regard to powers of High Court in dealing with acquittal appeal and the scope of appeal before the High Court, evidence of the prosecution is discussed hereinbelow:-

##. Shri A.B. Munshi, the learned advocate for the original complainant has submitted a short summary of evidence, itemwise, along with relevant documents on which the prosecution relies on for proving the case against the accused. That short summary along with xerox copies of the relevant documents are taken up on record of this appeal. Shri Munshi has argued that as per the case of the prosecution the accused was a cashier dealing with the transactions of making payments of cash amounts for and on behalf of the aforesaid three firms of the complainant and was also receiving the amounts of cash received from the banks. As per his case, the accused was an employee of Swastik Sales Corporation which is a main company and two other firms, named Pooja Sales Corporation and Rajashri Trading Company are the sister

concerns of the said main firm. As per the case of the prosecution, accused being cashier was entrusted with the cash of the aforesaid 3 firms and from that cash accused was dealing with business transactions with others, including the banks. In the beginning Shri Munshi has argued that looking to the complaint exh.90 accused had prepared about 8 debit vouchers stating inter alia that amounts stated in those vouchers were to be deposited in the bank. As per the case of the complainant, by preparing four different debit vouchers, namely, exh.25, 31, 39 and 42 accused withdrew cash of Rs.3,000/-, 5,000/-, 5,000/- and 13,000/- from cash and has misappropriated in all Rs.26,000/- of Swastik Sales Corporation. To prove that case he has argued that each of those four vouchers at Exh.25, 31, 39 and 42 is bearing a signature of the accused and these four items of withdrawal are reflected in daily account statements namely exh.26, 33, 40 and 43 respectively. As per these debit vouchers and daily account statements accused had withdrawn in all Rs.26,000/- by aforesaid four items, under the guise that said four items were required to be deposited in the bank but in fact those 4 items are not deposited in the bank and therefore the prosecution has relied on bank accounts, Exh.28, 37, 41 and 44 respectively.

##. Shri Munshi has further argued that by adopting the aforesaid modus operandi the accused has misappropriated two items of cash each of Rs.2,000/- from cash of Puja Sales Corporation. As per the short summary furnished by Mr Munshi for these two amounts each of Rs.2,000/- there are no vouchers on record but relevant daily account statements are there on record and they are at Exh.58 and 60 respectively. These two items do not reflect in the bank account exh.59 and therefore as per the case of the prosecution accused has misappropriated Rs.4,000/- by not depositing the said amount in the bank.

##. Shri Munshi has further argued that in the like manner the accused has misappropriated two items one of Rs.5,000/- dated 12.10.1979 and the other of Rs.1,000/dated 8.9.1979 by preparing debit vouchers for withdrawal exh.62 and 66 from the cash of Rajashri Trading Company and these two items are not reflected in the bank account exh.65. Here, it may be noted that for the first item of Rs.5,000/= dated 12.10.1979 of Rajashri Trading Company, the prosecution has produced daily account statement at exh.62 and for the second item of Rs.1,000/= dated 8.9.1979 the daily account statement is produced at exh.67.

##. By giving the aforesaid short summary, the learned advocate for the complainant has argued that the accused has misappropriated Rs.36,000/= by adopting the aforesaid modus operandi.

##. It is the case of the prosecution that the accused has misappropriated total amount of Rs.9000/= by four different items by drawing those amounts by cheques from the bank. The bank has debited four items in the respective bank account of respective firm but, the accused had not credited that amount in books of accounts of respective firms. As per the case of the prosecution, the accused had withdrawn by two different items from the bank from the account of Swastik Sales Corporation. As per the case of prosecution, accused has withdrawn Rs.2,000/= by cheque no.42152 dated 26.11.1977 of which a counterfoil of cheque is produced at exh.45 and another item of Rs.4,000/= by cheque no.73506 dated 19.1.1979 of which counterfoil of cheque is produced at exh.46. Thus, it is the case of the proseuction that accused had, by receiving the amounts of the aforesaid two cheques of which counterfoils are produced at exh.45 adn 46 from the bank and by not crediting said amounts in the books of account of the Swastik Sales Corporation, misappropriated an amount of Rs.6,000/-.

In like manner, the accused received an amount of Rs.3,000/- by tendering cheque no.78723 dated 5.1.80 of which counterfoil is produced at exh.70 in bank and did not credit the said amount of Rs.3,000/- in the books of account of Rajashri Trading Company and thereby he has misappropriated an amount of Rs.3,000/-.

##. Thus, as per the case of the prosecution by tendering 3 bearer cheques in the name of "Self" as person to receive the amount of cheques, the accused had misappropriated the aforesaid amounts. By giving the aforesaid particularls, the learned advocate for the original complainant has argued that the accused being cashier was an employee / servant of Swastik Sales Corporation was entrusted with the cash of the aforesaid three different firms and the accused has misappropriated a total amount of Rs.45,000/- for which the complaint at exh.90 was lodged on 16.2.1982 in the court of the learned Magistrate at Anand.

##. Shri Munshi has further argued that here in this case the prosecution has examined in all six prosecution witnesses and proved the fact with regard to entrustment of money to accused and the fact regarding an offence of criminal breach of trust committed by the accused and

though there is an ample evidence led by the prosecution to prove the ingredients of offence u/s 408 of IPC, the learned Magistrate has acquitted the accused by misreading the evidence led by the prosecution and therefore the judgement is patently wrong, perverse and it requires to be quashed and set aside and this Court should convict the accused for an offence punishable u/s 408 of IPC.

##. It would be in the interest of justice to know the defence of the accused at the stage of the trial of the case. If we read further statement of the accused recorded u/s 313 of Cr.PC we find that following facts are not disputed by the accused:-

(a) In reply to question no.2 put in the further statement the accused has tated that it was true that the complainant Rohitkumar Jasbhai Patel was carrying on the business of household articles and Swastik Sales Corporation, Pooja Sales COrporation and Rajashri Trading Company are the firms of the complainant.

(b) In reply to question no.10, accused has stated that Jasbhai, father of the complainant was managing the affairs of the business of the aforesaid 3 firms, since 1972.

(c) In reply to question no.13, accused has admitted that voucher dated 27.01.1979 for Rs.13,000/- is signed by him, as an accountant.

(d) In reply to question no.26, accused has admitted that vouchers are not written by him but those vouchers are signed by him as an accountant and daily statement account dated 24.1.1980 which is at exh.43 is not written by him.

(e) In reply to question no.35, he has advanced his case that cash of Rajashri Trading Company was not remaining with him but that cash was remaining with Jasbhai, father of the complainant.

(f) With regard to different vouchers, he has stated that each voucher is signed by him as an accountant while writing a rojmel (ledger book) after checking each voucher.

(g) In reply to question no.88 accused has submitted his written reply at exh.109.

##. Accused has advanced his defence in his written statement at exh.109 stating inter alia that he was an accountant and was doing the work of writing account books of the firm of the complainant. It is his case that he was writing pucca account books on the basis of rough account books of 3 firms. He has also stated that it was not his duty of work as a cashier and he has never worked as cashier for any of the three firms. He was not entrsuted with any cash of any firm at any point of time and that he has never entered into any transaction with regard to cash of any of the three firms. The accused has advanced his case that the complainant is not conversant with the books of account and only the father of the complainant i.e. Jasbhai Patel was looking after the business of each of three firms and along with his father one Jitubhai Jasbhai Patel i.e. younger brother of the complainant was also looking after the business of each of the said three firms. A specific case has been advanced that cash was being remained in custody of the father of the complainant and one Manubhai Narsibhai was helping the father of the complainant with regard to work relating to cash. It is also the case of the accused that Manubhai Narsibhai was writing daily vouchers and daily account statements and bank balance register.

##. It is the case of the accused that every day father of the complainant i.e. Shri Jasbhai Ramanbhai Patel was after checking the account books, carrying with him the cash to his house daily at the closure of the business hours of the each firm. He has also advanced his case that father of the complainant and brother of the complainant were taking amounts from the cash for their personal expenditures.

For the case with regard to bank transactions, it is the case of the accused that none of the entries in the books of account produced by the complainant is written by him and all the bank transactions were being carried out by Manubhai Narsibhai Patel and Kantibhai Ukadbhai.

##. Accused has advanced his case to explain as to why this type of complaint was lodged against him. It is his case that after leaving the job from the firms of the complainant, he has joined service with one another company which is also carrying on the business of household flourmill and as the complainant came to know that the accused has joined with the company of the rival party which is a competitor in the business, this complaint is lodged to bring pressure on him so that

accused may leave that company of the rival party. For evidence given by the witnesses, it is the case of the accused that all the witnesses are the employees serving in the firm of the complainant and under the pressure of the complainant they have given the evidence against the accused. In short, it is the case of the accused tha he never acted as a cashier and that he was merely an accountant in Swastik Sales Corporation and his duty was only to write pucca books of accounts on the basis of the rough account books and he knew nothing about any of the items of cash alleged to have been misappropriated by him.

##. To understand the case of the prosecution, certain facts are required to be taken into consideration which are as under:-

(i) The character of the complainant is a questionable character. He has admitted in para 69 of his evidence that it was true that one Chandubhai Chunilal Trivedi has lodged one complaint against him for making erasers and alteration and editions in the books of account of Usha Park Society and that complaint was pending even on the date of evidence.

(ii) As admitted by complainant in para 38 of his evidence the business of three firms is being carried on, in one office and the father of the complainant is attending that office from which business of three firms is being carried on. As admitted by him, his father was taking daily account statements, immediately after books of accounts were being written and thereafter his father was putting initials in the daily account statements.

(iii) As stated in para 38 and 39 of evidence of complainant there are five partners in Swastik Sales Corporation, namely, (1) Jitubhai, (2) Bhartiben, (3) Kamlaben, (4) Jayashriben and fifth of whose name he does not know. Thus, it is an admitted fact that the complainant was partner in Swastik Sales Corporation and therefore he has admitted in para 40 of his evidence that he is not a partner in Rajashri Trading Company but he is a partner in Pooja Sales Corporation.

(iv) As admitted by complainant in para 47 of his evidence, work relating to checking of account

books of their firms was being done by his father and thereafter his father used to put initials on the books of account. He has also admitted in para 47 of his evidence that he never checked or verified the books of account of Swastik Sales Corporation, obviously because he was not a partner in Swastik Sales Corporation. It is also admitted by the complainant that his father never complained for the items stated in the complaint to him.

(v) Complainant has admitted in para 49 of his evidence that it is true that cash on hand which was remaining at the closure of the day was being taken to his residence and therefore from this evidence some inference can be drawn. In case of R. PUTHU NAINAR ALTHITHAN, ETC. V. P.H. PANDIAN & Ors. reported in AIR 1996 SC 1599 the Honourable Supreme Court has held in para 7 as follows:-

"Therefore, we hold that to draw an inference that a fact in dispute has been established, there must exist on record some direct material facts or circumstances from which such an inference could be drawn. The standard of proof required cannot be put in a straight jacket formula. No mathematical formula can be led on the degree of proof. The probative value could be gauged from the facts and circumstances in a given case."

In para 8, it has further been held that an inference from the proved facts must be so probable that the facts do exist, it must be held that the fact has been proved. The inference of proof of that fact could be drawn from the given objective facts, direct or circumstantial.

From the evidence of the complainant it is crystal clear that every day father of the complainant was checking the books of account and he was putting initiatls after checking and verification of the books of account and further that cash on hand, which was remaining at the end of the day was being taken to the house of the complainant every day. From this evidence it could legitimately be inferred that father of the complainant did not find any lapse or mistake in

books of account of three firms of the complainant. It is pertinent to note that a case has been advanced by the accused that father of the complainant i.e. Shri Jasbhai Ramanbhai Patel and younger brother of the complainant i.e. Shri Jitubhai Jasbhai Patel were attending the office of three firms and they were looking after the business affairs. It has further been stated by the accused that both of them i.e. father and brother of the complainant were keeping cash with them. When the complainant has admitted that his father was checking the books of account daily, his father must have certainly checked and verified the cash-balance, every day and on mistake or lapse being found by his father, certainly, his father would have made complaint to the complainant. Under these circumstances, evidence of the father of the complainat is very much necessary but, prosecution has not examined the father of the complainant who was admittedly alive during the trial of the case. The prosecution has not examiend Jitubhai Jasbhai Patel also who was attending the offices of the firms.

(vi) The complainant has admitted in his evidence at para 56 that at the end of the financial year books of account were being settled and a loss and profit account was being prepared. He has admitted that no note has been made in loss and profit account of Swastik Sales Corporation that there are missing of items which are mentioned in the complaint. He has further admitted that whatever items of cash drawn from Swastik Sales Corporation were drawn for depositing them in the bank and therefore naturally the said items must have been debited in A/c of Bank, in the books of account of Swastik Sales Corporation. He has further admitted that no note is made in the bank balance register that particular items which were debited in the account of bank maintained in books of acocunt of Swastik Sales Corporation, have not been credited by the bank in their accounts. He has further admitted that it was true that whatever items of cash were withdrawn from the cash of the Swastik Sales Corporation are reflected in the vouchers, daily account statement and Rojmel of the firm and except these 3 documents, there is no other document in which such items were noted down.

If cash items are debitted in the account of bank in the accounts book of the Swastik Sales Corporation, then, naturally that account of the bank would not tally with the account of Swastik Sales Corporation which was being maintained by the bank because, it is the case of the complainant that the items of cash from the cash of the Swastik Sales Corporation are not at all credited in the bank and therefore at the end of the year, naturally profit and loss account must have been prepared the complainant would have certainly prepared a balance sheet and according to the balance sheet, items stated in the complaint were reflected in the account of the bank, in the books of accounts of Swastik Sales Corporation. In fact, said items are missing in the account of Swastik Sales Corporation kept and maintained by the bank. It is pertinent to note that period of embezzlement is for the period from 26.11.1977 to 5.1.1980 i.e. of two years, one month and 10 days. If in the first year, accounts of bank with the accounts of the complainant's firm were not tallying, then in the second year also there would be reflection of mistakes and lapses found in the books of account of the bank. Nobody took care to tally the accounts in books of account of the firms with the books of account of the bank. This is not possible because, father of the complainant was checking and verifying the books of account every day and cash on hand at the closure of the day was being taken at the residence of the comlainant, every day.

(vii) The complainant has admitted in para 57 of his evidence that it was true that his brother Jitubhai was withdrawing the money from Swastik Sales Corporation off and on for his personal expenses. Neither account of Jitubhai is produced nor said Jitubhai is examined.

(viii) Accused has put his case in cross-examination of the complainant in para 62 of the evidence of the complainant that as the accused did not go to the complainant to explain the mistakes/lapses, the complainant believed that the accused has misappropriated the amounts and therefore he has lodged the complaint. So the complainant has based his case merely because accused failed to come to the firm of the complainant to explain the lapses in the account.

(ix) The complainant has admitted in para 63 of his evidence that he has neither stated either in the complaint nor in his police statement that accused was writing vouchers, daily account statements, bank balance register and therefore for the first time the complainant has advanced his case in the Court that the accused was preparing the vouchers, daily account statements and bank balane register.

(x) The complainant has admitted in para 64 of his evidence that it was true that the accused joined his service as a peon-cum-messenger in the firm of the complainant in the year 1970-71 and subsequently in the year 1974 he was entrusted with the work relating to cashier. He has admitted that there is no documentary evidence to show as to what type of duties were assigned to accused in the year 1974. He has admitted in his evidence that the accused was sincere and his work was meticulous and therefore the accused was promoted in his firm. He has also admitted that the accused served in the firm of the complainant for the period from 1971 to 1981 and during that period neither the complainant nor his father had any complaint whatsoever against the accused. He has also admitted in para 65 of his evidence that it was true that they were satisfied with work of Manibhai-accused.

##. The prosecution has examined one Kantibhai Ukadbhai at exh.92A. He has deposed that on the date of his evidence he was serving as cashier both in Swastik Sales Corporation and Rajashree Trading Corporation. He joined the services as a peon in the yea 1973 and he started to work as a cashier from 1982 i.e. after the accused left the job. He has deposed that when he joined the service he saw that accused was working as a cashier and accused worked as cashier till he left the job. Thus, this witness is examined on the point that accused was working as a cashier since 1973 till he left the job. He has admitted in cross-examination that whatever the vouchers, daily account statements, bank balance statements were shown to him were written in his presence. He has come with another case that daily account statements were being signed by Jasbhai i.e. the father of the complainant and the father of the complainant was checking the daily account statements every day and thereafter Jasbhai was putting the signatures below the

statements for said statements having been checked by him. Thus, when account books were being checked every day, there is a reason to believe that there was no mistake or fault or lapse on the part of the accused. The father of the complainant is the best person to explain as to what types of mistakes and lapses were found by him. It is pertinent to note that till the complaint was lodged, father of the complainant did not make any grievance with regard to any of the items stated in the complaint, to the complainant.

##. The prosecution has examined one Rajendrakumar D Patel at exh.93A. Formerly he was working in Sales Department of Swastik Sales Corporation and he joined the service in the year 1974 and he left the job in 1983. He has deposed that the accused was doing the work as cashier. He has admitted in his cross-examination at para 8 that it was true that whatever the vouchers are produced in this case are signed by the accused above the word "Accountant" and therefore the vouchers on which the prosecution has relied on, were signed by the accused as Accountant and not as a cashier.

##. Keeping in mind the aforesaid admitted position on the part of the prosecution, now I will deal with the submissions made by the learned advocate for the accused:-

Shri K.B. Anandjiwala, the learned advocate for the accused, has vehemently argued that in view of Section 219 of Cr.PC three offences of the same kind within a year may be charged together. He has argued that in this case the charge has been framed for the total amount of Rs.45,000/- which consists of 11 items alleging that an offence of misappropriation of said 11 items has been committed by the accused during the period from 26.11.1977 to 5.1.1980 and therefore the charge has not been properly framed and the accused has been seriously prejudced to advance his defence. He has also argued that the charge is vague. No specific dates, items and the manner in which the misappropriation has taken place are described in charge and therefore the charge is defective and the benefit of doubt should be given to the accused. He has further argued that in view of Section 219 (2) of Cr.PC transactions ranging within a period of one year can be clubbed together. Here, in this case, 11 items ranging from 26.11.1977 to 5.1.1980 are clubbed together and therefore the charge is defective.

It may be noted that Section 219 of Cr.PC will

not be applicable to this case but Section 212(2) will be applicable. As per sub-section (2) of Section 212 of Cr.PC when the accused is charged with the criminal breach of trust or dishonest misappropriation of money or other movable properties, it would be sufficient to specifiy the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying the particular items or exact dates, and the cahrge so framed shall be deemed to be a charge of one offence within the meaning of Section 219.

##. In view of the above clear legal position, it is not necessary that different items of misappropriation are required to be stated date-wise and item-wise in the charge. It is sufficient if gross sum is stated in the charge. In this case, the gross sum i.e. Rs.45,000/= is stated and the period is also stated which is of 2 years one month and 10 days. It may be noted that proviso to sub-section (2) of Section 212 is very much important in this case. The same reads as under:-

> "Provided that the time included between the first and last of such dates shall not exceed one year."

Therefore, when a specific provision is made in Cr.PC for framing of the charge for an offence of criminal breach of trust, that provision is required to be complied with by the Court and as per proviso to sub-section (2) to Section 212 of Cr.PC, the time included between the first and last of such dates shall not exceed one year. Here in this case, the time exceeds one year. If we take the period of one year from 26.11.1977, one year would complete on 25.11.1978 and during that period of one year only one item of 26.11.1977 of Rs.2,000/= vide exh.45 will fall within one year and therefore it can be said that for other items charge is defective because other items fall outside the period of one year with effect from 26.11.1977.

##. Shri A. B. Munshi, learned advocate for the complainant has drawn an attention of this Court to Section 464 of Cr.PC. As per sub-section (1) of Section 464 of Cr.PC no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omision or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision,

a failure of justice has in fact been occasioned thereby. As held in the case of Bhoor Singh v. State of Punjab AIR 1974 SC 1256, the Code does not use the word "illegality" nor defines "irregularity" and "illegality" can only mean incurable because of prejudice leading to a failure of justice. When proviso to sub-section (2) to Section 212 of Cr.PC is specific that charge for an offence of criminal breach of trust is to be framed then, that charge should be for items falling within one year and if charge is framed for items falling outside period of one year, then that charge is contrary to Section 212 of Cr.PC and it can be said that it is an illegal charge. When accused was defending his case, he was knowing that as per Section 212 of Cr.PC he cannot be prosecuted for items falling outside one year. Therefore, in this case, there is a serious illegality of charge being framed in contravention of Section 212(2) of Cr.PC read with proviso below it.

##. Shri A. B Munshi has argued that as per the chart, stated earlier, by four different items namely Rs.3,000/-, 5,000/-, 5,000/- and 13,000/- accused has misappropriated in all Rs.26,000/- of Swastik Sales Corporation. To prove that case, he has argued that those four vouchers at Exh.25, 31, 39 and 42 are bearing the signatures of the accused and these four items are reflected in daily account statements namely exh.26, 33, 40 and 43 respectively. As per these vouchers and daily account statements accused had withdrawn in all Rs.26,000/- by four items as aforesaid under the guise that said four items were required to be deposited in the bank but in fact those 4 items are not deposited in the bank and therefore the prosecution has relied on bank accounts. He has further argued that had the accused deposited those four items in the bank as per the vouchers, there would be reflection of said four items in four different bank accounts and therefore by proving these documents, the prosecution has ably proved that the accused has committed criminal breach of trust for four items.

##. The prosecution has come with a specific case that accused being a servant of the complainant's firms has committed criminal breach of trust for total amount of Rs.45,000/- by different items and therefore the learned Judge of the trial Court has framed a charge against the accused for an offence punishable u/s 408 of IPC. To prove the case u/s 408 of IPC the prosecution is required to prove the following three ingredients:-

(i) that the accused was a clerk or a servant;
(ii) he was entrusted as a clerk or servant in his capacity with the property in question or with any dominion over property
(iii) he committed criminal breach of trust in respect of such propert.

Here in this case it is not in dispute that the accused was serving as a servant in the firm of the complainant named Swastik Sales Corporation. A dispute is there with regard to a point as to whether the accused was a cashier or accountant. The case of the complainant is that during the period which is shown in charge exh.4, that is, for the period from 26.11.1977 to 5.1.1980, the accused was a cashier while as per written statement exh.109 filed by the accused it is a specific defence of the accused that he was an Accountant in the firm of the complainant and duty was assigned to him only for writing regular books of account on the basis of the rough accounts and he never worked as cashier or no duty was assigned to him to work as cashier at any point of time.

##. Shri A.B. Munshi, the learned advocate for the Revision-Petitioner has argued that for prosecution it makes no difference as to whether the accused was an accountant or cashier because the prosecution has come with a specific case that cash of three different firms was entrusted to accused and accused was having a custody of cash of the said 3 different firms and from that cash, accused has misappropriated total amount of Rs.45,000/= as alleged in the complaint. Therefore, for prosecution it is not necessary to prove that accused was a cashier. He has further argued that if prosecution has proved its case beyond reasonable doubt that the accused was entrusted with the cash of 3 different firms, then, in the capacity of accountant also he can be held liable for an offence u/s 408 of the IPC. For the first ingredient that the accused was a clerk or servant, there is no dispute. For the second ingredient of entrustment of the cash, the prosecution relies on only oral evidence of the witnesses coupled with a single documentary evidence at exh.89.

The complainant has deposed in paragraph no.2 of his evidence that for the first time accused joined his service as peon-cum-messenger in the firm of the complainant in the year 1970-71 and subsequently in the year 1974 he was entrusted with the work relating to cashier. He has admitted in para 64 of his evidence that there is no documentary evidence as to what type of duties were assigned to accused in the year 1974. He has

admitted in his evidence that the accused was sincere and his work was meticulous and therefore the accused was promoted in his firm. He has also admitted that the accused served in the firm of the complainant for the period from 1971 to 1981 and during that period the complainant or his father had no complaint whatsoever against the accused. He has also admitted in para 65 of his evidence that it was true that they were satisfied with work of Manibhai i.e. accused. With regard to work which was entrusted to him in the year 1974 and therefore there is only oral evidence of the complainant that during the period in question the accused was working as cahsier in his firm. The prosecution has produced certain vouchers, daily account statements, entries from cash books of 3 different firms, account statements received from the bank and the registers with regard to entries of deposits and withdrawals made with the bank. The complainant has deposed in his evidence at para 2 that as a cashier the accused was performing his duties with regard to preparation of vouchers both for debit and credit transactions, preparation of daily account statements, and also with regard to transactions of depositing the cash with the bank and withdrawal of money on the basis of the cheques from the bank, etc. In short, the complainant has his say that except the work with regard to cash transactions all transactions were being handled by the accused.

##. In support of his evidence of complainant, the prosecution has examined following employees working in the firm of the complainat:-

##. P.W. No.2 Kantibhai Ukadbhai gave his evidence at exh.92A. He has deposed that on the date of his evidence he was serving as cashier both in Swastik Sales and Rajashree Trading Corporation. He joined the services as a peon in the year 1973 and he started to work as a cashier from 1982 i.e. after the accused left the job. He has deposed that when he joined the service he saw that accused was working as a cashier and accused worked as cashier till he left the job. Thus, this witness is examined on the point that accused was working as a cashier since 1973 till he left the job. He has admitted in cross-examination that whatever the vouchers, daily account statements, bank balance statements were shown to him were written in his presence.

##. P.W. No.3, Rajendrakumar Dahyabhai Patel Exh.93A, has deposed that he was working in Sales Department of Swastik Sales Corporation and he joined the service in

the year 1974 and he left the job in 1983. He has deposed that the accused was doing the work as cashier.

##. PW No.4 Manubhai Narsiabhai Patel has deposed that he was working as an Accountant in the firm of the complainant and during his tenure Kanubhai Maganbhai Patel was Head of the account department and he was working under Kanubhai Maganbhai Patel. As per his evidence, books of account of three firms were being written by him and Kanubhai M Patel, but, at the same time, he has also deposed that the accused was working as head cashier in the firm of the complainant.

##. PW No.6 - Rohitkumar Parshottambhai Exh.104 has deposed that he is working as Accountant-cum-Audit Clerk in firm named Millcent Household Flourmill since 14.10.1980. He has also deposed that he worked with the accused during the period between October 1980 and June 1981. He has deposed in para 2 of his deposition that when he joined the service, the accused was working as a cashier.

##. No documentary evidence is produced by the prosecution to show that particular duty was being performed by accused as a cashier. Merely to say that the accused was doing work as a cashier, it cannot be said that the fact is proved that the accused was working as a cashier. To substantiate the say of the complainant, the prosecution has produced one register of wages at exh.89. It is for the period from April 1980 to June 1981. It is the case of the complainant that the accused was working as a cashier right from 1974 onwards, the prosecution could have produced such type of register of wages for the period prior to April 1980. In this register exh.89 for the month of April, name of accused at serial no.2 is shown as head cashier. Likewise for subsequent months i.e. for the period from May 1980 to June 1981 the name of the accused is shown as head cashier. The accused has stated in para 7 of the written statement exh.109 that the complainant has produced in his evidence a pay register for the year 1980-81 but it is concocted and the same was prepared subsequently with a mala fide intention to involve accused in this case and that this pay register is not the original register. As discussed earlier, PW 2 Kantibhai Ukadbhai was working as peon since 1973 and he worked as such till 1982 when accused left the job. The name of Kantibhai Ukadbhai does not appear in this register at exh.89 in entries relating to April 1980. The name of PW 4 Manubhai Narsiabhai Patel who worked during the period from

November 1977 to June 1980 does not appear in this register exh.89 in entries relating to month of April 1980. The name of PW 6 Rohitkumar Parshottambhai Exh.104 who was working as Accountant cum Audit Clerk in the firm which was manufacturing Millcent Household Flourmills i.e. Swastik Sales Corporation does not appear in the entries relating to November 1980 to June 1981. It may be noted that in this register exh.89 one revenue stamp is affixed against the name of the accused for the entries relating to June 1981 but there is no signature of the accused on this revenue stamp affixed. Likewise, certain pages in which names of employees are written but other entries are not written. Thus, there is reason to believe that this register is not kept and maintained in due and regular course of business. When names of admitted employees do not appear in this register, then there is reason to believe that this register is produced with a view to show that the accused was serving as cashier and nothing more. When there is no such other register for the period prior to April 1980 this register seems to be doubtful and no bare reliance can be placed on such register to come to the conclusion that the acused was working as head cashier right from 1974 onwards till he left the job. Thus, the prosecution has not proved by producing cogent and believable evidence to prove that the accused was working as a cashier.

##. For a moment if it is believed that the accused was a cashier then for each item of embezzlement, prosecution must porve that cash of particular item was entrusted to accused and he embezzled the said item of cash for which complaint is lodged. To prove the case that the accused was entrusted with cash, the prosecution relies on only some vouchers. As stated earlier, for items relating to Swastik Sales Corporation, the prosecution relies on four different vouchers, namely, Exh.25, 31, 39 and 42 and it is the case of the prosectuion that these vouchers bear the signatures of the accused and these four items are reflected in daily account statements namely exh.26, 33, 40 and 43 respectively. There is no reference of any cashier in the said vouchers. Practically all the witnesses have stated that there is a signature of the accused below each of these vouchers and all these vouchers are signed by the accused as an Accountant and not as a cashier. As per these vouchers, as alleged by the prosecution, the accused withdrew the cash of Rs.3,000/-, Rs.5,000/-, Rs.5,000/- and Rs.13,000/-/from the cash of Swastik Sales Corporation under the guise that the said amounts were to be credited in the bank in the name of Swastik Sales Corporation but that amounts are not in fact at all deposited in the bank and as per

the bank accounts, namely, exh.28, 37, 41 and 44 said four items are not reflected at appropriate places in said bank accounts and therefore as argued by Mr Munshi the Court must have come to the conclusion that accused has committed criminal breach of trust by embezzling the said amounts of which total comes to Rs.26,000/-. As per the case of the prosecution, these four items were to be deposited in the bank but the same are not found credited by the bank in the account of Swastik Sales Corporation. For this material fact, the evidence of PW No.2 Kantibhai Ukadbhai is important and useful to come to a definite conclusion. He has deposed in his evidence in para 2 that he himself was doing work relating to bank and for that work he was required to go to bank for depositing the amount and withdrawing the amount from the bank by cheques and that work was being given to him by Manibhai i.e. present accused. He has deposed that for depositng the amount in the bank, the accused was preparing pay in slips of the bank and the accused was entrusting him the amounts to be deposited in the bank along with the said pay-in-slips. He has also deposed that after depositing those amounts in the bank, he was returning those pay-in-slips with bank endorsements to the present accused. Looking to this evidence, whatever amounts which were given to him by the accused for depositing in the bank in the name of respective firms of the complainant, were deposited by him in the bank. This witness is not declared as hostile witness and there is no reason to disbelieve his evidence and as per his evidence he had deposited the amounts in the bank. Had he deposited all the amounts entrusted to him by the accused in the bank, naturally there would be credit of the said amounts in the bank accounts. The prosecution has come with a specific case that when the aforesaid four items do not reflect in the books of account, as per arguments of Ms Kathaben, the Court should presume that the said amounts have been misappropriated by the accused. On one side the prosecution has led an evidence that Kantibhai Ukadbhai had deposited all the amounts which had been given to him by the accused and therefore the question does not arise to hold the accused responsible for the said amounts as he had already entrusted the work to Kantibhai Ukadbhai who in turn deposited the amounts in the bank. Therefore, by mere production of the vouchers, coupled with the bank accounts, no inference can be drawn that particular amounts had been embezzled by the accused. These are the only documents relating to four items and by proving these documents no inference can be drawn that particular items were entrusted to the accused and the accused did not deposit the same in the bank.

##. In the same manner, prosecution has come with a specific case that the accused had misappropriated two items each of Rs.2,000/- of Pooja Sales Corporation. For these two items the prosecution has not produced any voucher as alleged to have been prepared by the accused. The prosecution has only produced daily account statements exh.59 and 60 and related bank account exh.59. It is the case of the accused that those two items were withdrawn by the accused from Pooja Sales Corporation under the guise that the same were to be deposited in the bank but the said two items are reflected in bank account exh.59 and therefore the COurt shoud come to the conclusion that said amounts have been misappropriated by the accused.

##. In the like manner, the prosecution has come with a specific case that the accused has misappropriated two items : one of Rs.5,000/- and the another of Rs.1,000/-/of Rajashri Trading Company for which the prosecution has proved one item. For the first item of Rs.5,000/- i.e. item appearing at exh.62 the prosecution has not porduced any daily account statement but for the second item of Rs.1,000/-, the daily account statement is produced at exh.67.

##. The prosecution has also produced the bank balance registers. The first register commences from 23.11.1977 to 6.11.1978. First register is at exh.55 and the second bank balance register is at exh.48. Looking to these two registers, it was a long standing practice of the complainant that as and when the amounts were being deposited, entries were made in this bank balance register, date wise and item-wise and as and when items were being withdrawn from the bank or cheques were being encashed from that bank, those items were also being noted down separatly in the second column and in the third column the balance remained at credit in the bank was being noted down date-wise. By showing these registers, the prosecution wants to show that the items which were withdrawn for depositing in the bank, do not appear in these two registers and by producing debit vouchers, daily statement accounts and the bank accounts, the prosecution wants to make this Court believed that said amounts have been misappropriated by the accused. As discussed earlier, these registers are part of books of account. It is not the case of the prosecution that the accused has committed an offence of falsification of accounts punishable u/s 477A of IPC. As per section 477A of IPC whoever being the clerk, officer or servant or employed or acting in the capacity of a clerk, officer,

or servant wilfully and with intent to defraud destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer or has been received by him for or on behalf of his employer or willfully and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Therefore, for an offence of falsification of accounts, it is not necessary that only books of account are to be falsely prepared. If a clerk or a servant makes or abets of making a false entry in or omits or alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer or has been received by him for or on behalf of his employer or wilfully and with intent to defraud or makes or abets the making of any false entry in or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, it can be said that he has committed an offence punishable under Section 477A of IPC.

##. Here, in this case it is not the case of the prosecution that the accused has committed an offence punishable u/s 477A of IPC. Therefore, when there is no case for an offence punishable u/s 477A of the IPC, then it can be said that said vouchers and daily statment of accounts are genuine documents and they were prepared in accordance with business routine or business procedure. As discussed earlier, looking to the evidence of Kantibhai Ukadbhai who was working as peon-cum-messenger to attend the work of bank had already deposited the amounts which were given to him by the accused and that he had returned the pay in slips with the bank endorsements. It is not the case of the prosecution that the accused himself had personally gone to deposit the said amounts in the bank. It may be noted that on the basis of debit vouchers, the daily account statements were prepared and on the basis of daily account statements, regular books of account were being written by Shri Manubhai Narsibhai Patel and Kanubhai Maganbhai Patel. Kanubhai Maganbhai Patel is not examined by the prosecution but Manubhai Narsibhai has been examined by the prosecution. He has categorically deposed in his evidence at para 9 that it was true that cashbooks were not being regullary written, daily and daily cash was not being carried forward day-today in cash book and

therefore the books of account are not relevant u/s 34 of the Indian Evidence Act. Still however the prosecution has produced books of account in piecemeal. The prosectuion has produced following books of account of respective firms of the complainant:-

I) SWASTIK SALES CORPORATION:

1) Cashbook for the period from 16.11.1978 to 31.10.1979;

2) Cashbook for the period from 6.11.1978 to 20.10.1979;

3) Cashbook for the period from 26.10.1979 to 14.4.1980.

II. POOJA SALES CORPORATION:

1) Cashbook for the period from 6.11.1978 to 20.11.1979;

III. RAJASHRI TRADING COMPANY;

1) Cashbook for the period from 6.11.1978 to 20.10.1979;

2) Cashbook for the period from 26.10.1979 to 14.4.1980.

##. It may be noted that for the reasons best known to the prosecution, the prosecution has not produced the relevant ledger book of the respective firm. The evidence of ledger book is very much important to come to the conclusion that particular amount had been deposited or not in the bank. The prosecution has only relied upon the bank's statements given by the bank. The prosectuion has withheld best available evidence of respective ledger books of respective firms. It is commonly known that whatever entries are made in cashbooks, are posted in respective accounts in ledger books and that cash book and ledger book both can be said to be books of account. Here, in this case, the proseuction has produced only cash books and not the ledger books. Had the prosecution produced ledger books, then, the Court could have seen the respective bank accounts in ledger book of respective firms and from that accounts of bank, one could see that respective item of withdrawal under the debit voucher for depositing in the bank have been posted or not. And at the end of the year when balance sheet is prepared the

amount at credit or debit in the respecitve bank would be shown in that balance sheet. As stated earlier, the case of the prosecution with regard to misappropriation of different items is falling within the period of two years one month and 10 days. From the evidence it is clear that father of the complainant i.e. Shri Jasbhai was checking the books of account every day and after due checking and verification, he was putting his short initials below the books of account. It has also come in the evidence that everyday father of the complainant was carrying cash of each firm with him at the closure of the business hourse to his house. If this was the position, then, certainly he would have found that particular items which were sent for depositing in the bank have not been deposited in the bank and he would have immediately drawn the attention of the complainant or the accused. The complainant has stated in his evidence that his father never drew his attention to such misappropriation and therefore this is a case in which the evidence of the father of the complainant is very much necessary. The prosecution has withheld the best available evidence of the father of the complainant and therefore an adverse inference is drawn against the proseuction that had the prosecution examined father of the complainant, then the position would be otherwise and quite contrary to the case alleged in the complaint.

Thus, in view of what is stated hereinabove, the prosecution has withheld the best available evidence of the respective ledger books, and evidence of the father of the complainant. It may also be noted that brother of the complainant i.e. Jitubhai was also attending the office and he was also withdrawing the amounts from the firms. If the ledger books had been produced, then, one could see from the accounts of the father of the complainant, and the accounts of Jitubhai that particular amounts were withdrawn by them on particular days. That evidence is withheld and therefore the evidence is not so satisfactory that one can come to the conclusion that the accused was entrusted with the said amounts for which vouchers have been produced and those amounts have been embezzled by him by not depositing in the bank. Generally, a businessman, at the end of the year, will prepare a balance-sheet and from the balance-sheet it can be said that the accounts are true and correct. The complainant has admitted in his evidence at para 55 that the balance sheet is being prepared at the end of the accounting year and accordingly the balance sheet was prepared at the end of year 1979 and in that balance sheet amounts which have been credited by the Bank are not shown and no note had been made to the effect that

particular amounts which were sent for the credit in the bank are found in short for account purpose. I am of the view that prosecution ought to have produced that balance sheet prepared at the end of the year 1979 and from that balance sheet the Court could have come to the conclusion on the point whether particular amounts have been misappropriated by the accused or not.

##. The prosecution relies on 3 audit reports. They are at exh.92, 93 and 94. Exh.92 is an audit report for Swastik Sales Corporation. Exh.93 is the audit report for Rajashri Trading Corporation while exh.94 is an Audit Report for Pooja Sales Corporation. In all the 3 audit reports, the auditor has stated that transactions with regard to items stated therein are doubtful. The Auditor has not given a specific opinion that items stated in the said reports have been embezzled by the accused being cashier of the respective firms and on the basis of the said reports one cannot come to the conclusion that in fact the said amounts stated therein have been misappropriated by the accused.

##. The second part of the case of the prosuection is with regard to withdrawal of money by cheques from bank and not depositing those amounts of cheques in the account books of the respective firms.

##. As per the case of the prosecution by two cheques of which counter foils are produced at exh.45 and 46 accused has misappropriated amounts of Rs.2,000/- and Rs.4,000/-. For the first item of Rs.2,000/-, of which counterfoil of cheque is at exh.45, the prosecution has not produced daily account statement. As per the case of the prosecution, cheque no.42152 was drawn in favour of self and that amount was withdrawn from the bank but the same has not been credited in the books of account of Swastik Sales Corporation. It is not the case of the prosecution that the accused himself had gone to bank to encash that cheque of Rs.2,000/-. On the contrary, the complainant has deposed in para 3 of his evidence that whenever necessity was arising to withdraw the amount from the bank, the cashier was preparing the cheque of that amount as per need and then he would take the signature of the partner and thereafter, either cashier or peon would go to the bank to encash the cheque. The complainant has admitted in para 59 that an amount of Rs.2,000/- by cheque (counterfoil of which is at Exh.45) was drawn from the bank by PW No.2 Kantibhai Ukadbhai. Thus, the accused had not gone to encash that cheque. Now, it is the duty of the prosecution to lead the evidence to show as to what happened to that amount of Rs.2,000/- which

was brought by Kantibhai Ukadbhai from the bank. In absence of the evidence it can be presumed that the said amount remained with Kantibhai. Kantibhai has not explained anything about this cheque of Rs.2,000/-/and the evidence of Kantibhai was recorded after the evidence of the complainant was over. Kantibhai Ukadbhai has admitted in his evidence in the cross-examination that he is not able to say as to whether the amount which was brought from the bank was credited in the firm or not. It means that the amount of Rs.2,000/- which was brought by Kantibhai Ukadbhai did remain with him. The complainant has admitted in his evidence at para 59 that it was true that many times Kantibhai used to go to the bank to fetch money from the bank. Under the circumstances, when the cheque was given to Kantibhai, accused cannot be held responsible for the said amount of Rs.2,000/-.

##. As regards another amount of Rs.4,000/- of cheque, the counterfoil of which is at exh.46, the complainant has admitted in his evidence at para 60 that the said amount was also brought by Kantibhai Ukadbhai. Kantibhai has not categorically deposed that the said amounts of two cheques were given to the accused.

##. Under the circumstances, the case with regard to these two cheques of which counterfoils are produeced at exh.45 and 46, is not proved against the accused. Likewise, it is the case of the prosecution that cheque of which counterfoil is produced at exh.70 was encashed by the accused and the same is not credited in the books of account of Rajashri Trading Company. The prosecution has produced daily account statement exh.71 and bank account at exh.72 to show that this particular amount of Rs.3,000/- was brought from the bank but the same is not credited in the books of account of Rajshri Trading Company. The prosecution has not produced any evidence to show as to who had gone to bank to encash that cheque as it is in the evidence that PW No.2 Kantibhai Ukadbhai used to go to the bank to deposit the amount and for withdrawal of the amount and therefore it was necessary to know as to who tendered that cheque in the bank for encashment. The prosecution could have requested the trial Court to summon the bank authorities to produce that cheque of Rs.3,000/- and the prosecution could have led evidence by showing the signature on the back of cheque as to who encashed that cheque. Therefore, in the absence of any evidence from the bank with regard to this cheque, no definite conclusion can be arrived at that the accused had withdrawn that amount from the bank. During the course of the arguments, Shri A.B.Munshi, the learned

advocate for the Revision-Petitioner has fairly conceded that so far as the case with regard to encashment of cheques is concerned, he does not press this case and therefore out of Rs.45,000/- the case is with regard to encashment of cheques total amounting to Rs.9,000/- is not proved beyond reasonable doubt.

##. Here, in this case, the proseucution only relies on the debit vouchers, daily statement of accounts, bank accounts, and bank balance register to show that particular amounts have not been credited in the bank and the said amounts have been misappropriated by the accused. No witness has deposed that particular amounts stated in respective debit vouchers were in fact withdrawn from the cash of the respective firms and same remained with the accused. The prosecution has tried to prove the case on the basis of such documentary evidence only. In case of DADARAO V. THE STATE OF MAHARASHTRA reported in AIR 1974 SC 388 it has been held by the Hon'ble Apex Court that mere entries in the books of account without any oral evidence as to the nature of business and the mode of keeping accounts is not sufficient to prove entrustment. Here in this case only the aforesaid documents are produced. There is no evidence with regard to the withdrawal of that amounts from the cash of the firm and mode of keeping account is not led. Therefore, on the basis of such documents only the prosecution case cannot be said to have been proved against the accused.

##. In view of the discussion made hereinabove, I have examined oral as well as documentary evidence minutely and carefully and come to the conclusion that there is no reason to come to a contrary conclusion in reply to conclusion arrived at by the trial court. The trial court has appreciated the evidence in detail and the trial court has assigned reasons to come to a definite conclusion that the case is not proved against the accused. For the reasons stated by me as above, there is no reason to differ with the view taken by the learned Magistrate. In the case of STATE OF KARNATAKA V. HEMA REDDY reported in AIR 1971 SC 1417 it has been held by the Hon'ble Apex Court that it is not the duty of the appellate Court, when it agrees with the view of the trial Court on the evidence, to repeat the narration of the evidence or to reiterate the reasons given by the Court, the decision of which is under apppeal will ordinarily suffice.

##. Under the circumstances, for the reasons stated by me, the evidence is such that this Court cannot come to a

conclusion that the prosecution has proved the case beyond reasonable doubt. In the result, these appeal and Criminal Revision Application both deserve to be dismissed and therefore accordingly both are dismissed by confirming the judgement Exh.118 dated 26.12.1991 rendered by the learned Judicial Magistrate First Class, Anand, in Criminal Case No.3159 of 1982.

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(mohd)

/appeal/